SUPREME COURT

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-774

THOMAS HARTEN and LAURIE HARTEN,
Petitioners,

vs.

JOHN COONS, Capt. U.S. Army, HARVEY C. PHELPS, Major, MSC, JOHN DOE, employee of the United States, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THOMAS HARTEN and LAURIE HARTEN,
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JOHN COONS, Capt. U.S. Army, HARVEY C. PHELPS, Major, MSC, JOHN DOE, employee of the United States, and UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Thomas Harten and Laurie Harten, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 502 F2d 1363. The opinion appears in the appendix hereto. The opinion of the District Court for the District of New Mexico was not reported. A copy of that opinion appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on September 26, 1974. This petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1). The District Court's jurisdiction was invoked pursuant to 28 USC §1346(b).

QUESTION PRESENTED

Whether a suit for alleged negligence of a military physician during an elective vasectomy performed on an active member of the United States military is an "injury to a serviceman arising out of or in the course of activity incident to service." *Feres* v. *United States*, 340 US 135 (1950); *Brooks* v. *United States*, 337 US 49 (1949); *United States* v. *Brown*, 348 US 110 (1954).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 USC 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a pri-

vate person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USC 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE

Plaintiff, Thomas Harten, while on active duty in the United States Army, underwent elective surgery in a military hospital. The surgery, performed by military physicians, was a vasectomy. Thereafter, plaintiff, Laurie Harten, wife of Thomas Harten, conceived and bore a child. Plaintiffs brought suit pursuant to the Federal Tort Claims Act, more specifically, 28 USC §1346(b). The complaint charged that the vasectomy performed on Thomas Harten was negligently performed and such negligence resulted in the pregnancy of Laurie Harten and the later birth of a child. (R. 5-6) The suit was brought against the doctors performing the surgery and the United States. (R. 5-6) The United States moved to dismiss, basing its motion on *Feres* v. *United States*, 340 US 135 (1950). The District Court for the District of New Mexico denied that motion on the grounds that a vasectomy is not "incident to service," and not within the rule of *Feres* v. *United States*, supra. (R. 17-18) The District Court certified that its order involved a controlling question of law as to which there was substantial ground for difference and that an immediate appeal would materially advance the termination of the case. (R. 18) The Court of Appeals for the Tenth Circuit

then granted the Government's motion for an interlocutory appeal. (R. 19) The Court of Appeals reversed the District Court on September 26, 1974.

REASONS FOR GRANTING THE WRIT

1) The Court of Appeals for the Tenth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by the Supreme Court.

The Federal Tort Claims Act abrogated sovereign immunity in tort for the Executive branch of Government. 28 USC §§1346(b), 1402(b), 1504, 2110, 2401(b), 2411(b), 2412, 2671-80. The statute provides that the District Courts of the United States shall have jurisdiction over *any* claim based on any alleged negligence of the United States. The statute has twelve specific exceptions, none of which are applicable in the instant case. One further exception is a judicially created exception for military plaintiffs who are injured "incident to service". *Feres* v. *United States,* 340 US 135 (1950).

The important question of federal law which needs to be decided by this Court is the scope of the concept of "course of activity incident to service," first enunciated in *Feres* v. *United States,* supra. The Court in *Feres* v. *United States,* supra, concluded:

> ". . . that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident to service." 340 US 135, at 146.

The essential dispute in the instant case, as in almost all the reported cases following *Feres* v. *United States,*

supra, is the definition and scope of that concept. Petitioners assert that the concept is not as broad as the Tenth Circuit ruled.

In *Brooks* v. *United States*, supra, this Court held that servicemen were entitled to recovery under the Federal Tort Claims Act for otherwise actionable injuries, provided such injuries were not incident to service. The Court reserved ruling on the question of whether recovery would be allowed if the injury was incident to service. That question was answered in *Feres* v. *United States*, supra.

In *United States* v. *Brown*, supra, the Court further defined the scope of the concept, holding that a discharged veteran may recover under the Act for negligent treatment at a Veterans Administration hospital for a service-connected disability. Since that time this Court has made no further pronouncements on the subject. Petitioners contend that the concept needs further definition.

Many lower courts have applied what is best characterized as a "but for" test. These courts adopted the test that but for the plaintiff's status as a serviceman he would not have been in a military hospital in the first place and therefore his claim is not actionable. See, e.g. *Henning* v. *United States*, 446 F2d 774 (3rd Cir. 1971), cert. den. 404 US 1016; *Lowe* v. *United States*, 440 F2d 452 (5th Cir. 1971), cert. den. 404 US 833; *Henninger* v. *United States*, 473 F2d 814 (9th Cir. 1973), cert. den. 414 US 819; *Harten* v. *Coons*, 502 F2d 1363 (10th Cir. 1974); *Healy* v. *United States*, 192 F.Supp. 325 (DC NY 1961), aff'd 295 F2d 958 (2nd Cir. 1961); *Schwager* v. *United States*, 326 F.Supp. 1081 (DC Pa 1971).

Other lower courts have applied a different standard. See, e.g. *Hale* v. *United States*, 416 F2d 355 (6th Cir. 1969); *Knecht* v. *United States*, 242 F2d 929 (3rd Cir. 1957);

Brown v. *United States*, 103 F.Supp. 51 (WD Ky 1952); *Wilcox* v. *United States*, 117 F.Supp. 119 (SD NY 1953); *Rosen* v. *United States*, 126 F.Supp. 13 (ED NY 1954); *Lee* v. *United States*, 261 F.Supp. 252 (CD Cal 1966). The District Court for the District of New Mexico applied what Petitioners contend to be the correct standard, whether the operation or other action was necessary for the plaintiff's fulfillment of his military obligation.

In any event, it is clear that the concept of "incident to service" remains highly ambiguous and stands in great need of clarification by this Court. The Court of Appeals for the Sixth Circuit stated:

> "The standard incident to military service has many deficiencies as a basis for exclusion under the Federal Tort Claims Act as other courts have pointed out. It is so lacking in precision that the mere fact that the plaintiff was in military service at the time of the accident can provide a logical basis for the government's arguing for the exclusion of the person connected on a *post hoc, ergo propter hoc* basis." *Hale* v. *United States*, 416 F2d 355, at 358.

Petitioners respectfully ask this Court to grant certiorari to clear a glaring ambiguity in the *Feres* doctrine, supra.

2) The Decision of the Court of Appeals for the Tenth Circuit Has Decided This Federal Question in a Way in Conflict with Applicable Decisions of the Supreme Court.

Petitioners further contend that the decision rendered by the Court of Appeals in this case is in conflict with *Feres* v. *United States*, supra, and *United States* v. *Brown*, supra. The court below stated:

> "Whether a serviceman's injury arises out of activity 'incident to service' depends on whether it stems from an official military relationship between the negligent person and the serviceman. In other words, it depends on the claimant's 'status' at the time of the injury." *Harten* v. *Coons*, 502 F2d 1363, at 1365.

Petitioners respectfully suggest that the "status" of the claimant is not the test to be used to determine if the injury arose out of activity incident to service.

The rationale of the *Feres* decision, supra, was based on the need to avoid harmful effects upon military discipline. Thus, the concept of cause of activity incident to service relates to activities that further the performance of military duty. As the District Court noted, however, the medical operation involved here was not necessary for the fulfillment of the military obligation of Mr. Harten. In denying him the right to sue on his claim of medical malpractice, the Court below stepped outside the bounds of this Court's decision in *Feres* v. *United States*, supra, and cases thereafter construing that decision. Thus, this Court should grant the writ of certiorari to correct that mistaken application of its decisions.

This Court has specifically stated the rationale of the *Feres* doctrine, supra. In *United States* v. *Muniz*, 374 US 150 (1963), the Court stated:

> "In the last analysis, *Feres*, seems best explained by the, 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty'. . ." 374 US 150.

The Court of Appeals in the instant case overlooked the fact that the above-stated rationale is inapplicable to certain situations of military life that are simply counterparts to civilian life. A serviceman suing for the alleged negligence of a military doctor during *completely elective* surgery has no effect on military discipline. Doctors, be they civilian or military, are held to a professional standard of care totally unrelated to their military status. Petitioners submit that the line drawn in the *Feres* decision, supra, was between injuries that did and injuries that did not arise from the fulfillment of military obligations and that decision in no way limited the right to recovery for acts unconnected with military service. "Incident to service" does not depend upon the claimant's status as the Court of Appeals held, *Harten* v. *Coons*, supra, at 1365. It does depend on the nature of the course of activity and whether that activity is service-related. The performance of a vasectomy is a course of activity that bears no relationship whatever to military duties and obligations. This Court should grant Writ of Certiorari because the decision below is in direct conflict with *Feres* v. *United States*, supra.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER, 1974, TERM

No. 74-1023

THOMAS HARTEN and LAURIE HARTEN,
Plaintiffs-Appellees,

v.

JOHN COONS, HARVEY C. PHELPS, JOHN DOE and UNITED STATES OF AMERICA,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 10100)

(Filed September 26, 1974)

Judith S. Feigin (Carla A. Hills, Assistant Attorney General; Victor R. Ortega, United States Attorney; Robert E. Kopp, Department of Justice, on the brief), Washington, D. C., for Defendants-Appellants.

Louis S. Marjon, (James A. Toulouse, on the brief), for Plaintiffs-Appellees.

Before HILL and McWILLIAMS, United States Circuit Judges, and SMITH,* District Judge.

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*Honorable Talbot Smith, Eastern District of Michigan sitting by designation.

HILL, Circuit Judge.

This is an interlocutory appeal from an order denying the government's motion to dismiss a serviceman's suit for injuries under the Federal Tort Claims Act (Act), 28 U.S.C. § 1346(b).[1]

Appellees are Thomas Harten and his wife, Laurie. In 1971, Thomas, on active duty in the United States Armed Forces, underwent an elective vasectomy operation at Sandia Base, New Mexico. He was then provided with an analysis report indicating he was sterile. Subsequently, Laurie became pregnant and bore a child. The Hartens then brought this action under the Act, in the United States District Court for the District of New Mexico, against the military medical personnel involved in the operation and the United States. The complaint alleged the operation had been negligently performed and that the Hartens had negligently been provided with an inaccurate analysis report. Additionally, the complaint requested $50,000 for the necessary costs of raising and maintaining the child to the age of eighteen.

The government moved to dismiss the suit on jurisdictional grounds. The trial court found that appellees had not exhausted their administrative remedies, and dismissed the suit without prejudice. Appellees then filed a motion for reconsideration, and stated that an administrative claim had been filed with and disapproved by the United States

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1. 28 U.S.C. § 1346(b) provides, in part: "Subject to the provisions of . . . this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Army Claims Service. The motion further stated that appellees' counsel had inadvertently neglected to submit the claim to the court. The trial court vacated its order dismissing the suit and allowed the parties two months to file additional authorities concerning the government's motion to dismiss.

The government's motion placed primary emphasis on the doctrine announced in Feres v. United States, 340 U.S. 135 (1950), that "[t]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The trial court found that a vasectomy operation was not "incident to service" and denied the government's motion, but stated that an immediate appeal could be taken because the order involved a "controlling question of law as to which there is substantial ground for difference of opinion."

The question presented by this appeal appears to be one of first impression in the Tenth Circuit.[2]

Whether a serviceman's injury arises out of activity "incident to service" depends on whether it stems from an official military relationship between the negligent person and the serviceman. In other words, it depends on the claimant's "status" at the time of the injury. *See, e.g.,*

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2. An analogous case is Barr v. Brezina Const. Co., 464 F.2d 1141 (10th Cir. 1972), *cert. den'd,* 409 U.S. 1125, which involved a third-party indemnity claim against the government. Brezina obtained a contract to do remodeling work on a building at Hill Air Force Base, in Utah, and sublet the installation of an access stairway. Barr, an airman on active duty, fell down the stairway while engaged in the performance of military duties. Barr instituted suit against Brezina, who settled for $45,000 and brought an indemnity action against the government on the grounds it knew the stairway was defective. The trial court dismissed the suit because, inter alia, Barr would have been precluded from direct recovery himself under the *Feres* doctrine. This Court affirmed.

Henning v. United States, 446 F.2d 774 (3rd Cir. 1971), *cert. den'd,* 404 U.S. 1016.

Thus, if a claimant is on leave,[3] or on inactive status at the time of the injury,[4] or if the injury is not the product of a military relationship,[5] suit under the Act may be allowed.

On the other hand, when a serviceman on active duty sustains an injury stemming from the military relationship, courts consistently have denied recovery under the Act.[6] Surgery, whether elective or required, is "incident to service" when performed upon a serviceman on active duty

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3. In Brooks v. United States, 337 U.S. 49 (1949), suit under the Act was permitted by a serviceman on leave who was negligently injured on a public highway when the vehicle in which he was riding was struck by a government vehicle driven by a government employee.

4. In United States v. Brown, 348 U.S. 110 (1954), a serviceman sustained a knee injury while on active duty and Veterans Administration doctors negligently operated on the knee seven years after his discharge. Suit was permitted under the Act.

5. In United States v. Snyder, 218 F.2d 266 (4th Cir. 1954), *aff'd mem.*, 350 U.S. 906, suit under the Act was permitted by an off-duty serviceman who sustained injuries when a military aircraft crashed into his off-base residence.

6. *See, e.g.,* Herreman v. United States, 476 F.2d 234 (7th Cir. 1973), member of National Guard killed when military aircraft in which he was riding crashed; Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), *cert. den'd,* 414 U.S. 819, serviceman suffered injuries when Navy doctors negligently performed a hernia operation required for discharge; Henning v. United States, 446 F.2d 774 (3rd Cir. 1971), *cert. den'd,* 404 U.S. 1016, Army doctor negligently misread a serviceman's X-ray and failed to advise him of a tubercular condition which subsequently became aggravated; Lowe v. United States, 440 F.2d 452 (5th Cir. 1971), *cert. den'd,* 404 U.S. 833, elective surgery; Shults v. United States, 421 F.2d 170 (5th Cir. 1969), sailor on liberty struck by automobile and taken to military hospital where he died due to alleged negligence of military doctors; Chambers v. United States, 357 F.2d 224 (8th Cir. 1966), serviceman drowned in military swimming pool due to alleged negligence of government in failing to keep qualified lifeguards at pool and to provide adequate life saving equipment.

because the serviceman is taking advantage of medical privileges granted only to military personnel. Herreman v. United States, 476 F.2d 234 (7th Cir. 1973). A case in point is Lowe v. United States, 440 F.2d 453 (5th Cir. 1971), *cert. den'd*, 404 U.S. 833, where a serviceman on active duty underwent elective surgery. In affirming the dismissal of the action the appellate court stated:

> [I]t is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service."

We believe Harten's injuries were sustained in the course of activity incident to service and that a suit thereon cannot be maintained under the Act. The trial court's order denying the government's motion to dismiss is therefore REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 10,100 Civil

THOMAS HARTEN and LAURIE HARTEN,
Plaintiffs,

vs.

JOHN COONS, Capt., U.S. Army, HARVEY C. PHELPS, Major, MSC, JOHN DOE, Employee of the United States, and UNITED STATES OF AMERICA,
Defendants.

ORDER

(Filed January 2, 1974)

The defendants rely in their motion to dismiss plaintiffs' Federal Tort Claims action on the doctrine established in *Feres* vs. *United States*, 340 U.S. 135 (1950). "We conclude," the Court in *Feres* ruled, "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service." The court referred repeatedly to *Brooks* vs. *United States*, 337 U.S. 49 (1949), emphasizing that the injury to Brooks "did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. . . . Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

In the suits alleging malpractice brought under the Federal Tort Claims Act, recovery has been denied. Two of the three cases consolidated for purposes of opinion in *Feres* involved malpractice. In the Jefferson case the plaintiff underwent a gall bladder operation, and in Griggs the plaintiff was admitted under official orders for surgery and treatment although the reason for the operation was not set out. Other cases have involved alleged malpractice or negligence during a pre-induction physical, discharge physical, and emergency operation. In all cases recovery was denied. *Healy* vs. *United States,* 192 F. Supp. 325 (D.C. N.Y. 1961), Aff'd 295 F.2d 958 (2nd Cir. 1961); *Henning* vs. *United States,* 446 F.2d 774 (3rd Cir. 1971); *Schwager* vs. *United States,* 326 F. Supp. 1081 (D.C. Pa. 1971). But in each case the operation or other action taken was necessary to the plaintiff's fulfillment of his military obligation. Such is not the case with Harten.

It can hardly be argued that a vasectomy is an operation necessary for Harten's performance of his military duties. As in the Brooks case, Harten was under compulsion of no military duty or mission. There is, undeniably, a military connection in that Harten would not have been operated upon by a military doctor nor would he have been given analysis by military personnel had he not been in the armed forces. This alone, however, is not sufficient for the vasectomy operation to be considered incident to service as required in *Feres.* For this reason the Motion of the defendants to dismiss is hereby denied.

This order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this order may materially advance the ultimate termination of the litigation.

/s/ (Illegible)
United States District Judge